CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 734

MARY FLAGLER CARY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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Docket Entries

1

DOCKET NO. 96066

MRS. MARY FLAGLER CARY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

2

Appearances:

For Petitioner: Joseph C. White, Esq., Richard H. Wilmer, Esq.

For Respondent: John R. Wheeler, Esq.

DOCKET ENTRIES:

1938

Nov. 5—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 5—Copy of petition served on General Counsel. 3

1939

Jan. 3—Answer filed by General Counsel.

Jan. 3—Request for Circuit hearing in New York City filed by General Counsel.

Jan. 12—Notice issued placing proceeding on New York City Calendar. Copy of answer and request served.

Sept. 19—Hearing set Nov. 13, 1939, New York, N. Y.

4 *Docket Entries*

Nov. 14—Hearing had before Mr. Murdock on the merits. Submitted. Consolidated with 96235-6-7. Stipulation of facts filed. Briefs due in 60 days—reply briefs in 15 days.

1940

Jan. 12—Motion for extension to Jan. 28, 1940 to file brief filed by General Counsel.

Jan. 16—Notice of appearance of Richard H. Wilmer as counsel filed.

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Jan. 16—Motion for leave to file attached printed brief filed by taxpayer. 1/18/40 granted.

Jan. 18—Brief filed by taxpayer.

Jan. 23—Motion for leave to file brief filed by General Counsel—brief lodged. 1/24/40 granted.

Jan. 24—Copy of brief served on General Counsel.

Feb. 1—Memorandum reply brief filed by General Counsel.

Feb. 6—Reply brief filed by taxpayer. 2/6/40 copy served.

May 31—Memorandum opinion rendered—Mr. Murdock,

6 Division 3. Decision will be entered for respondent.

May 31—Decision entered—J. E. Murdock, Division 3.

Aug. 27—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Aug. 27—Praecipe for record filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Petition

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MRS. MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A:1-JMF:90D) dated August 25, 1938, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with residence at 1009 Park Avenue, New York, New York. The return for the period here involved was filed with the Collector for the Third District of New York.

2. The notice of deficiency (copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 25, 1938.

3. The taxes in controversy are income taxes for the calendar year 1936 and in the amount of Eleven thousand eighty-four dollars ($11,084).

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(1) Substitution of the basis of $68,610.24 in lieu of a basis of $122,943.62 in the computation of a profit

10 *Petition*

on the sale of 1,919 shares of the preferred stock of Standard Oil Export Corporation.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On May 20, 1913, one Henry M. Flagler, a resident of St. Johns County, Florida, died testate leaving a last will and testament dated February 1, 1902 and seven codicils dated respectively February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January
11 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in Court of County Judge in and for St. Johns County, Florida, on May 24, 1913.

(b) Item Third of said last will and testament provided as follows:

> "I have been for many years investing in railroads, hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved
> 12 wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the 'Fourth' Item of this instrument, and may be necessary for the expense of administration by my executors, including court costs, to my Trustees above named, which trust shall be and continue for the length of time hereinafter by this instrument provided."

(c) Said last will and testament after providing in Item Fourth for certain relatively small bequests provided in Item Fifth thereof as follows:

"The balance of my estate I place, according to the purpose declared in the 'Third' Item of this instrument, in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida Properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida Railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby."

(d) Item Sixth of said last will and testament provided in part as follows:

"During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:

"1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dollars ($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annuity and that herein-

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after by subsequent clause of this item provided for, as shall not be required during the extended or second period of said trust, provided for in the 'Fifth' Item of this instrument shall be paid to my said wife annually."

(e) Item Seventh of said last will and testament provided in part as follows:

"in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered,

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assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock."

(f) The petitioner herein is one of the children referred to in the foregoing quotation from Item Seventh of said last will and testament and was born prior to May 20, 1913.

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(g) Item Ninth of said last will and testament provided as follows:

"All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and

transfer to my said wife at the expiraion of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New York, and my property, Number Twenty-one West Fifty-fifth Street in the City of New York, state and county of New York."

(h) Item Tenth of said last will and testament provided in part as follows:

"For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the course of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust.

* * * * * * *

"It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the state of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes

shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall be extended to any other than the following companies:

"The Florida East Coast Railway Company, and the Florida East Coast Hotel Company."

(i) Item Third of the codicil of said Henry M. Flagler dated January 8, 1906, provided in part as follows:

"I wish to, and do hereby amend the 'Tenth' Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

"In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes."

(j) Item First of the codicil of said Henry M. Flagler, dated September 13, 1912, provided as follows:

"Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making,

publishing and declaring of my said last will and testament, certain changes in the form of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests.

"Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the ownership thereof, as I have heretofore or may hereafter exercise and pay for."

(k) Pursuant to the provisions of Item Fifth of said last will and testament said trustees elected to continue said trust beyond the end of five years from the time of the death of said Henry M. Flagler and said trust did continue for a period of ten years from the time of the death of said Henry M. Flagler and terminated on May 20, 1923.

(l) Said trustees delivered, assigned and transferred to the petitioner subsequent to May 20, 1923, but as of that date, 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited. In 1925 the petitioner received a stock dividend of 2,666 ordinary shares of the stock of Anglo-American Oil Company, Limited in respect of said 8,000 shares of said stock, giving her an aggregate of 10,666 shares of said stock. On January 31, 1930 said 10,666 shares were exchanged for 1,919.88 shares of the preferred stock of Standard Oil Export Corporation. In 1930 the petitioner sold the 88/100 share and in her income tax return for that year ascribed a tax basis thereto of $56.38.

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(m) The fair market value of said 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited on May 20, 1923, was $123,000. The fair market value of said 1,919.88 shares of the preferred stock of Standard Oil Export Corporation on January 31, 1930 was $186,228.36.

(n) The tax basis of said 1,919 shares of preferred stock of Standard Oil Export Corporation on May 28, 1936, was not less than $122,943.62.

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(o) On or about May 28, 1936 the petitioner sold said 1,919 shares of the preferred stock of Standard Oil Export Corporation for which she received the net amount of $215,462.21.

WHEREFORE, the petitioner prays that this Board may hear the proceeding, redetermine the deficiency alleged in said notice of deficiency, determine that the petitioner has made an overpayment of tax in respect of the taxable year herein involved, and grant such other and further relief as the Board shall deem proper.

JOSEPH C. WHITE,
15 Broad Street,
New York, N. Y.
Counsel for Petitioner.

30

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

MARY FLAGLER CARY being duly sworn deposes and says:

That she is the petitioner above named; that she has read the foregoing petition or had the same read to her and is familiar with the statements contained therein; and that the statements contained therein are true except those

Exhibit A 31

stated to be on information and belief and that those she believes to be true.

MARY FLAGLER CARY.

Subscribed and sworn to before me
this 4th day of Nov., 1938.

GEO. R. McGEE
Notary Public, Nassau County
Nassau County Clerk's No. 2220
New York Co. Clerk's No. 312 Reg. No. O-Mc-185
Commission Expires March 30, 1940 32

(Seal)

EXHIBIT A

1467M SN-IT-1

Aug. 25, 1938

IT:A:1
JMF:90D

33

Mrs. Mary Flagler Cary,
1009 Park Avenue,
New York, New York.

Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1936 discloses a deficiency of $11,150.47 as shown in the statement attached.

34 *Exhibit A*

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the at-
35 tention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

36 By (Signed) W. T. SHERWOOD,
Acting Deputy Commissioner.

JMF/RS-2

Enclosures:
Statement
Form of waiver

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STATEMENT

IT:A:1
JMF:90D

Mrs. Mary Flagler Cary,
1009 Park Avenue,
New York, New York.

Tax Liability for Taxable Year Ended
December 31, 1936

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	Liability	Assessed	Deficiency
Income tax	$144,048.75	$132,898.28	$11,150.47

In making this determination of your income tax liability careful consideration has been given to the report of examination dated May 26, 1938, and to the facts and data on file in this office.

A copy of this letter and enclosures has been mailed to your representative Mr. Joseph C. White, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

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Adjustments to Net Income

Net income as disclosed by return	$256,868.06
Unallowable deductions and additional income:	
(a) Dividends	97.75
(b) Capital gain	16,300.01
Net income adjusted	$273,265.82

40 *Statement*

Explanation of Adjustments

(a) Dividend on four shares Allied Mills valued at $97.75 received on Corn Products Refining Company stock omitted from the return has been added to total dividends reported.

(b) The facts show that you received 8,000 shares Anglo-American Oil stock plus a stock dividend of 33⅓ percent making a total of 10,666⅔ shares with a cost basis to the decedent of $6.4375 per share. This stock was exchanged in
41 1930 on the basis of 5⅝ shares for one share of Standard Oil Export Preferred stock resulting in 1,919.88 shares on a basis of $35.7638 per share, or a total of $68,666.62. Since 0.88 shares with a cost of $56.38 were sold in 1930 there remains a corrected basis of $68,610.24 for the remaining 1,919 shares sold in the taxable year 1936. Inasmuch as the correct basis of 1,919 shares of Standard Oil Export Preferred stock is $68,610.24 instead of $122,943.62, the fair market value at date of distribution as reported, there is an increase in capital gain of $54,333.38. Since the original stock was held more than ten years the increase in taxable gain is 30 percent of this amount or $16,300.01. Section 113(a)(5) of
42 the Revenue Act of 1936 provides as follows:

> "Property Transmitted at Death—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *."

The term acquisition is defined in article 113(a)(5), Regulations 94, as "* * * the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property * * *."

Statement 43

Computation of Tax

Net income adjusted	$273,265.82
Less:	
Personal exemption	2,500.00
Surtax net income	$270,765.82
Less:	
Earned income credit (10% of $3,000.00)	300.00
Balance subject to normal tax	$270,465.82
Normal tax at 4% on $270,465.82	$ 10,818.63
Surtax on $270,765.82	133,290.12
Total tax	$144,108.75
Less:	
Income tax paid at source	60.00
Income tax liability	$144,048.75
Tax previously assessed, account #207386	132,898.28
Deficiency	$ 11,150.47

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45

JMF/RS-2

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Answer

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96,066.

MRS. MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

47

Respondent.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed in this proceeding, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

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3. Admits that the taxes in controversy are income taxes for the calendar year 1936, but denies the remaining allegations of paragraph 3 of the petition.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. Admits the allegations contained in subparagraphs (l) and (o) but denies the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (m), and (n) of paragraph 5 of the petition.

Denies each and every allegation in said petition not hereinbefore admitted or denied.

WHEREFORE, it is prayed that the appeal be denied.

J. P. WENCHEL, WFG
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

E. O. HANSON, Division Counsel.
JOHN R. WHEELER,
Special Attorney,
Bureau of Internal Revenue.

JRW/drc 12/29/38.

Stipulation of Facts

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

It is hereby stipulated and agreed by and between the Petitioner and the Respondent by their respective attorneys

52 *Stipulation of Facts*

of record that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The Petitioner is an individual with residence at 1009 Park Avenue, New York, New York. The return for the period here involved was filed with the Collector of Internal Revenue for the Third District of New York.

53 2. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, and seven codicils dated, respectively, February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in the Court of County Judge in and for St. Johns County, Florida, on May 24, 1913. A copy of said last will and testament and codicils thereto, together with the probate proceedings thereon, marked Exhibit A, is attached hereto and made a part hereof.

54 3. Pursuant to Items Third and Fifth of said last will and testament a trust was created covering substantially the whole of the estate of the Testator, including stock of Anglo-American Oil Company, Limited, hereinafter referred to.

4. By Item Fifth of said last will and testament, said trust was to continue for a term of five years from the time of the death of the Testator, and for an additional term not exceeding five years if the Testator's Florida properties should be in such condition as "to require financial aid from someone outside of themselves * * *."

55

5. Pursuant to the provisions of Item Fifth of said last will and testament, said trust did continue for a period of ten years from the time of the death of the Testator and terminated on May 20, 1923.

6. On May 20, 1923, the date of the expiration of said trust, three children of Harry Harkness Flagler, son of the Testator, were living. The Petitioner was one of said three children.

7. Pursuant to the decree of the Circuit Court, Eastern District of Missouri, in the case of *U. S.* v. *Standard Oil Co. N. J. et al.,* 173 Fed. 177 (1909), and affirmed with modifications by the Supreme Court of the United States, in the case of *The Standard Oil Company of New Jersey* v. *The United States,* 221 U. S. 1, providing for the disintegration of the Standard Oil Co. of New Jersey, there was issued to and received by the stockholders of said Standard Oil Co. of New Jersey one ordinary share of the stock of Anglo-American Oil Company, Limited, for each share held of the stock of Standard Oil Co. of New Jersey.

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8. Subsequent to May 20, 1923, but as of that date, said trustees transferred, pursuant to the provisions of said last will and testament and codicils, to the Petitioner, among other things, 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, which had theretofore been held by said trustees in trust as aforesaid.

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9. Said 8,000 shares of the stock of Anglo-American Oil Company, Limited, so transferred to the Petitioner had been acquired by said trustees as follows:

(a) Two thousand six hundred sixty-six and two-thirds of said shares were received, with others, by said trustees as of the date of death of the Testator, namely May 20, 1913.

58 *Stipulation of Facts*

(b) On November 26, 1913, after the estate of the Testator was in the hands of said trustees, a 100% stock dividend was declared by the Anglo-American Oil Company, Limited. Said trustees accordingly received, on December 3, 1913, 2,666⅔ additional ordinary shares of said stock.

(c) In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional shares of the ordinary stock of said company. Two thousand six hundred sixty-six and two-thirds shares were subscribed for by said trustees at $7.50 per share. These 2,666⅔
59 shares were received by said trustees on May 1, 1918.

10. In 1925 the Petitioner received a stock dividend of 2,666 ordinary shares of the stock of Anglo-American Oil Company, Limited, in respect of the 8,000 shares of said stock which had been transferred to her by said trustees as aforesaid, giving her an aggregate of 10,666 shares of said stock.

11. On January 31, 1930, said 10,666 ordinary shares of the stock of Anglo-American Oil Company, Limited, were exchanged in a tax-free reorganization for 1,919.88 shares
60 of the preferred stock of Standard Oil Export Corporation (5⅓ shares of Anglo-American Oil Company, Limited, stock for one share of preferred stock of Standard Oil Export Corporation).

12. In 1930 the Petitioner sold the 88/100 share of preferred stock of Standard Oil Export Corporation and in her income tax return for that year ascribed a tax basis thereto of $56.38.

13. On or about May 28, 1936, the Petitioner sold the remaining 1,919 shares of the said preferred stock of Stand-

ard Oil Export Corporation for which she received the net amount of $215,462.21.

14. In reporting such sale of said 1,919 shares of said preferred stock and computing the profit therefrom in her income tax return for the year 1936, the Petitioner ascribed a basis of $122,943.62 to said 1,919 shares of said preferred stock of Standard Oil Export Corporation.

15. The market value on May 20, 1923, of the ordinary shares of Anglo-American Oil Company, Limited, was $15.25 per share.

16. The market value on May 20, 1913 of the ordinary shares of Anglo-American Oil Company, Limited, was $18.25 per share.

17. In the notice of deficiency (a copy of which, marked Exhibit A, is attached to the petition) the Respondent ascribed to said 1,919 shares of said preferred stock of Standard Oil Export Corporation a basis of $68,610.24 in lieu of the basis of $122,943.62 ascribed by the Petitioner as aforesaid.

Dated New York, N. Y., November 13, 1939.

JOSEPH C. WHITE
Attorney for Petitioner

J. P. WENCHEL
ECA
Attorney for Respondent

64

EXHIBIT A

CERTIFIED COPY OF

LAST WILL AND TESTAMENT

WITH CODICILS THERETO

65

of

HENRY M. FLAGLER
Deceased

AND PROBATE PROCEEDINGS THEREON BEFORE THE
HON. M. R. COOPER, COUNTY JUDGE OF
ST. JOHNS COUNTY, FLORIDA

66

INCLUDING PETITION FOR PROBATE OF WILL AND CODICILS,
WITH PROOFS, AFFIDAVIT OF EXECUTORS, ORDER
ADMITTING TO PROBATE, OATH OF EXECUTORS,
LETTERS TESTAMENTARY, ETC.

Exhibit A 67

LAST WILL AND TESTAMENT
WITH CODICILS THERETO
of
HENRY M. FLAGLER, Deceased

I, Henry M. Flagler, of Palm Beach, county of Dade and state of Florida, do make, declare and publish this my last will and testament, hereby revoking all former wills and 68
testaments by me made.

FIRST: I direct all my just debts, funeral expenses and the expenses of administering and carrying out the provisions of this instrument to be fully paid.

SECOND: I hereby appoint William H. Beardsley of the city, county and state of New York, and William R. Kenan, Jr., at this date residing in the city of Lockport, State of New York, and Joseph R. Parrott, of the city of Jacksonville in the state of Florida, to be executors of and Trustees under this my last will and testament.

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THIRD: I have been for many years investing in railroads, hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the "Fourth" Item of this instrument, and may be necessary for the expense of administration

70 *Exhibit A*

by my executors, including court costs, to my Trustees above named, which trusts shall be and continue for the length of time hereinafter by this instrument provided.

FOURTH: I have agreed by letter addressed to John F. Forbes, to contribute to the John B. Stetson University, the sum of Sixty Thousand Dollars ($60,000) to be paid from time to time as the needs of said University shall seem to require, and if any portion of said Sixty Thousand Dollars ($60,000) shall remain unpaid at the time of my death, I hereby direct my said executors to pay said balance out of
71 any moneys or property coming into their hands as such.

I have also agreed to contribute to the Florida Agricultural College, which college is located at Lake City, Florida, the sum of Twenty Thousand Dollars ($20,000), for the erection and equipping of a gymnasium, and if any portion thereof shall remain unpaid at the time of my death, I hereby direct my executors to pay the same to the proper authority of said college out of any moneys or property coming into their hands as such.

FIFTH: The balance of my estate I place, according to the purpose declared in the "Third" Item of this instrument,
72 in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida

railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby.

SIXTH: During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:

1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dollars ($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annuity and that hereinafter by subsequent clause of this item provided for, as shall not be required during the extended or second period of said trust, provided for in the "Fifth" Item of this instrument shall be paid to my said wife annually.

2. To the Trustees of the Memorial Presbyterian Church Society of St. Augustine, Florida, the annual sum of Three Thousand Dollars ($3,000), payable in quarterly installments from the date of my decease; but it is to be distinctly understood that this annuity to said Trustees shall cease upon the payment of the bequest to said Trustees hereinafter made by a subsequent item of this instrument.

3. The lawful expenses of such trust.

SEVENTH: At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or

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instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son. And in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said
77 trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock. I have heretofore in my life given to my said son securities which have during the last five years yielded him an annual income of more than seventy-five thousand ($75,000). My son has not shown for me the filial regard that would make me inclined to do more for him now than is done by this item of my will.

EIGHTH: At the expiration of said trust the Trustees
78 shall pay to each of the following named persons and institutions the cash amounts hereinafter provided to be paid; but no such persons or institution shall take hereunder unless such person or institution shall be living or in existence at the expiration of said trust. Should, however, any such person not be living at the time his or her amount is payable as above and hereinafter provided, then I direct that such sum shall be paid to his or her child or children, if there be any such child or children then living, such children, if there be more than one, to take share and share alike, and where there is a wife surviving she is to take as a child; but if such donee be dead and there be no child or children nor any

wife in case the donee is a male person, then the legacy shall not take effect or be operative.

1. To Miss Annie C. McKay, of the city of St. Augustine, Florida, and to Mrs. Ella Green, now at Palm Beach, Florida, and to Stephen A. Bravo, John P. Beckwith, William H. Chambers, E. J. Triay and George W. Wilson, each the sum of Five Thousand Dollars ($5,000).

2. To Bernard O'Brien, my coachman, George Holland, my butler, and Ida Scheiffer, my housekeeper, the sum of Five Thousand Dollars ($5,000) each in recognition of their long and faithful service in such capacities. 80

3. To James A. McGuire, R. T. Goff, Fred Sterry, John Anderson, Joseph D. Price, Henry W. Merrill, Joseph A. McDonald, William H. Beardsley, and Jasper C. Salter, each the sum of Ten Thousand Dollars ($10,000).

4. To James E. Ingraham, the sum of Twenty Thousand Dollars ($20,000).

5. To Joseph R. Parrott, the sum of One Hundred Thousand Dollars ($100,000).

6. To Charles D. Boice and Lawrence C. Haynes each the sum of Twenty-five Hundred Dollars ($2,500). 81

7. To the Florida Agricultural College above named, the sum of Eighty Thousand Dollars ($80,000).

8. To the John B. Stetson University above named, the sum of Forty Thousand Dollars ($40,000).

9. To the trustees of Hamilton College in the state of New York, One Hundred Thousand Dollars ($100,000).

10. To the trustees of the Memorial Presbyterian Church Society of St. Augustine, Florida, above mentioned Seventy-five Thousand Dollars ($75,000). Should my Trustees find that all of or any of the bequests herein above by this item

of this instrument provided for, can be paid before the expiration of said trust without interfering with the purposes of such trust then they may pay the said bequests or such of them as they may decide can be paid without such interference and shall elect to pay, preferring that made to the Trustees of the Memorial Presbyterian Church Society above the others.

NINTH: All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust
83 and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and transfer to my said wife at the expiration of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New
84 York, and my property, Number Twenty-one West Fifty-fifth Street in the city of New York, state and county of New York.

TENTH: For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the course of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end

that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust.

The names or titles, executors or Trustees wherever used in this instrument shall be deemed to include and denote any and all persons who shall be, under the provisions hereof, be appointed substitutes or successors whether immediately or otherwise of such Trustees or be otherwise appointed successors or substitutes for such executors as executors; and I hereby authorize, empower and direct said Trustees, their substitutes or successors to pay from my estate all the necessary expenses of administering and carrying into effect such trust, and my executors to pay all the necessary expenses of administering as executors; and such Trustees shall receive from my said trust estate, each the sum of five thousand dollars ($5,000) annually to be paid in cash annually as compensation for each year as such Trustee.

It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the state of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall be extended to any other than the following companies:

The Florida East Coast Railway Company; and the Florida East Coast Hotel Company.

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I direct that my executors and Trustees nominated or appointed in or under the provisions of this instrument shall in either capacity not be required to give bond or surety or indemnity for or in connection with the discharge of powers or duties hereunder.

If by reason of failure to qualify or otherwise any or all of the Trustees specifically nominated in this instrument shall not serve or shall cease to serve after having qualified as such I hereby direct that such vacancy or vacancies be filled by appointment by such of them as may qualify or be serving at the time that any such vacancy may occur,
89 and should they be unable to agree then such vacancy shall be filled by the Circuit Judge of the Judicial Circuit in which Palm Beach, Florida, my place of residence may be at the time, from two persons, of whom one shall be nominated by each of such Trustees then surviving; and should there be two vacancies existing at any one time, then such vacancies shall be filled by the remaining Trustee and my said wife, and if such surviving Trustee and my wife cannot agree, then such vacancies shall be filled by appointment to be made by such Circuit Judge as follows:

One from two persons to be nominated by such surviving Trustee and the other from two persons to be nominated
90 by my wife; and should there be a vacancy at any time as to all of such Trustees, then the same shall be filled by appointment by my wife subject to the approval of the said Circuit Judge. If at the time of the filling of any such vacancy there should be duties to be performed under this instrument by executors as distinguished from Trustees then the person or persons appointed to such vacancy or vacancies as Trustees shall act as executor or executors under this instrument.

ELEVENTH: I do further direct, ordain and declare and it is my will that if any person named in this instrument

as a beneficiary or legatee or devisee or any one interested thereunder shall at any time or in any manner institute or cause to be instituted or shall aid, abet, connive at or directly or indirectly promote, the institution of any contest of, or proceeding or litigation contesting or intended to contest, defeat or obstruct this instrument or any provision thereof or the enforcement of any such provision, then any and every such offending person or persons whether natural or artificial shall, whether such contest, proceeding or litigation be successful or not thereby forfeit all interest under this instrument, and the provision made in and by such instrument for any such offending person shall be of no effect 92 and this instrument shall be executed and carried into effect as if such person were not named therein and no provision had been made therein as to or for such person.

TWELFTH: I desire and direct that Mr. Joseph R. Parrott above named shall be continued during the continuance of such trust in the same official and business relations that he now occupies as to and in the management of and administration and operation of my said railroad and hotel companies and land companies and the properties of the same and each of them, and that he shall receive compensation for his services therein not less than he may be receiving at my death, such compensation to be in addition to and dis- 93 tinct from the above provided annual compensation of five thousand dollars as Trustee under this instrument; and it is to be distinctly understood that nothing in his duties as such Trustee is to interfere with his continuing such existing relation as to such companies and properties or either or any of the same, nor with his voting any stock held by him and his co-Trustees as such Trustees, in any such company or voting as director or otherwise acting to the end that his being continued in such existing relation to such companies or properties or any of the same. I further desire and will and direct that nothing in the duties of such Trustees hereunder shall

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prevent them or any of them from acting as a director or other official of any company aforesaid or of any company in which I may be a stockholder or interested. Whatever transfer of stock to any one of such Trustees may be necessary to enable him to be a director in any such company I direct shall be made by such Trustees and I authorize such Trustees to depute and authorize any one of their number to vote and otherwise act for all such Trustees at any meeting or stockholders.

THIRTEENTH: It is my will and meaning that the annual
95 compensation of Five Thousand Dollars ($5,000) above provided for each Trustee shall also cover any services rendered by any Trustee, or person acting as such, as an executor.

In witness whereof I have hereto set my hand and seal at Palm Beach in the county of Dade and state of Florida, this first day of February, A. D. one thousand nine hundred and two.

(Signed) HENRY M. FLAGLER (Seal).

The foregoing instrument comprising ten pages of typewritten matter, written upon one side of the sheet only was on this the first day of February, A. D. one thousand nine
96 hundred and two, signed, sealed, published and declared by the testator, Henry M. Flagler, as and for his last will and testament in the presence of us and of each of us at Palm Beach in the county of Dade and state of Florida, and we in the presence and at the request of said testator and in the presence of each other have hereunto subscribed our names as witnesses to said last will and testament and have severally written opposite our respective names our individual addresses, this the day and year last aforesaid.

(Signed) GEO. P. RANEY, Tallahassee, Fla.
" B. F. WILLIS, Tallahassee, Fla.
" LELAND STERRY, Palm Beach, Fla.

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I, Henry M. Flagler, of Palm Beach, Dade county, state of Florida, being of sound and disposing mind and memory, do make, publish and declare this as and to be a codicil to my last will and testament executed by me at Palm Beach, Dade county, Florida, February 1st, A. D. 1902.

Item First: Nothing in my said last will and testament is to be understood or be construed as having the effect to deny to the trustees, mentioned in the Fifth Item thereof, the power and authority to complete any particular extension of the railroad of the Florida East Coast Railway Company south of Miami that may have been commenced at the time of my death, but on the contrary they shall have the power and authority to complete any such extension that may have been commenced at the time of my death.

Item Second: Nothing in the Twelfth Item or elsewhere in my said last will and testament is to be understood or be construed as meaning that Mr. J. R. Parrott, mentioned in said will and testament, shall not succeed me in the Presidency of the Florida East Coast Railway Company, but on the contrary it is my purpose and desire that he shall at my death, become the President of such Company, and I hereby direct that upon my death he shall be elected to such Presidency, and further direct that he shall, during the continuance of the trust provided as to said railroad and the properties of the same by my last will and testament, be continued in such Presidency: the occupation of such office by him, being in my judgment necessary to carry out my purposes as to his management, administration and operation of my railroad properties as expressed in the Twelfth Item of my said last will and testament.

In testimony whereof I, the said Henry M. Flagler, have hereunto set my hand and seal at Palm Beach, Dade county, Florida, this February 17th, A. D. 1903.

(Signed) HENRY M. FLAGLER (Seal).

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The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of Palm Beach, Dade County, Florida, in our presence and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we, at his request, and in his presence and in the presence of each other have hereto set our hands as subscribing witnesses, at Palm Beach, aforesaid, this the day and year last above written.

(Signed) LELAND STERRY.
101 " GEORGE E. HOPKINS.
" A. R. WOOD.

I, Henry M. Flagler, of Palm Beach, Dade county, state of Florida, being of sound and disposing memory, do make, publish and declare this as and to be a second and additional codicil to my last will and testament executed by me at Palm Beach, Dade county, state of Florida, February 1st, 1902.

FIRST: Wherever the expression "expiration of said trust," or an expression of similar import is used in my said last will and testament, the same shall be understood to in-
102 clude the extended period of said trust as well as the original period of five years. Such has always been my intention and understanding of the terms used, but this explanation is adopted for the purpose of preventing any misunderstanding of my will or purposes.

SECOND: I wish further to say, in explanation of the provision made in Item numbered "Seventh" of my said last will and testament for my son Harry Harkness Flagler, that in case he should not be living at the time of my death or at the time of the expiration of the trust therein referred to, such expression "expiration of said trust" to be understood

as explained in the Item numbered "First" of this codicil, then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate.

THIRD: I hereby revoke the Item of my said last will and testament numbered "Eighth" in so far as it makes provision for the payment of eighty thousand dollars to the Florida Agricultural College, now known as the Florida University, and located at Lake City, Florida, and in so far as it makes provision for the payment of forty thousand dollars to the John B. Stetson University, located at DeLand, Florida, and annul the gifts made therein to such institutions severally; and I hereby direct that at the expiration of the trust provided for by my said last will and testament and referred to in Item number "First" of this codicil, the trustees shall pay to each of the following persons the cash amounts hereinafter provided to be paid, to wit: to Joseph P. Greaves, Robert Murray and Leland Sterry each the sum of ten thousand dollars; and this provision for said three gentlemen is to be read and construed as part of the Item numbered "Eighth" of said last will and testament and subject to the provisions thereof the same as if written into said Item numbered "Eighth" as a part of the third subdivision thereof; and in so far as William H. Beardsley is concerned, I hereby change and increase the provision made for him by the third paragraph of Item numbered "Eighth" of my last will and testament to the sum of Fifty Thousand Dollars, it being my will and direction that he shall be paid this sum instead of ten thousand dollars.

FOURTH: The words "any meeting or stockholders" at the conclusion of Item numbered "Twelfth" of my said last will and testament are to be read and construed as meaning "any meeting of stockholders."

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FIFTH: For the purpose of declaring my will as to the disposition of the rest, residue and remainder of my estate mentioned in and covered by Item numbered "Ninth" of my said last will and testament, I hereby amend the said Item numbered "Ninth" of my last will and testament, by adding at the end of such item the following words: to wit: but in case I should survive my wife, Mary Lilly Flagler, leaving no children surviving me except my son Harry Harkness Flagler, I hereby give, devise and bequeath all of such property and estate to the following persons, to be divided between them share and share alike, forever, and I hereby authorize,
107 empower and direct my said executors and trustees, to pay over and transfer said property to them at the expiration of said trust all of such estate and property, viz: Rob H. York, Roy H. York, W. L. Harkness and Mrs. John D. Maclennan, all of Cleveland, Ohio, William R. Kenan, Jr., Jesse K. Wise and Sarah G. Kenan, all of Wilmington, North Carolina, Joseph R. Parrott, of Jacksonville, Florida, and William H. Beardsley of New York City. Should any one or more of such nine persons not be living at my death, then the share which any such deceased person would take if he or she were living at the time of my death shall go to his or her heirs forever, and be payable to such heir or heirs at the
108 expiration of such trust.

In testimony whereof I, the said Henry M. Flagler, have hereunto set my hand and seal, at St. Augustine, Florida, this April 28th, A. D. 1904.

(Signed) HENRY M. FLAGLER (Seal).

The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of Palm Beach, Dade County, Florida, in our presence and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we at

his request and in his presence and in the presence of each other, have hereto set our hands as subscribing witnesses, at St. Augustine, aforesaid, this the day and year last above written.

(Signed) ANDREW ANDERSON of St. Augustine, Florida.
" GEO. P. RANEY of Tallahassee, Fla.
" B. F. WILLIS of Tallahassee, Fla.

I, Henry M. Flagler, lately of Palm Beach, Dade County, State of Florida, but now of St. Augustine, St. Johns County, 110
State of Florida, being of sound and disposing mind and memory, do make, publish and declare this as and to be a third and additional codicil to my last will and testament executed by me at Palm Beach, Florida, February 1st, 1902:

Item First: I find, upon further consideration of the matter, that the statement in Item "Seventh" of my above mentioned last will and testament to the effect that I had prior to the execution of such last will and testament given to my son, Harry, securities which had yielded to him during the last five years preceding the date of such last will and testament an annual income of more than Seventy-five Thousand Dollars is not entirely correct as to the amount; 111
nevertheless, I do not consider that there is, under all the circumstances, any good reason for increasing the provision made in favor of my said son by my said last will and testament, and I make the above declaration simply because of the above mentioned inaccuracy of statement in my said last will and testament. The securities referred to are Standard Oil Stock.

Item Second: I hereby revoke the provision of the "Eighth" Item of my said last will and testament, constituting the second sentence in such item and reading as fol-

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lows: "Should, however, any such person not be living at the time his or her amount is payable as above and hereinafter provided, then I direct that such sum shall be paid to his or her child or children, if there be any such child or children then living, such children, if there be more than one, to take share and share alike, and where there is a wife surviving she is to take as a child: but if such donee be dead and there be no child or children, nor any wife in case the donee is a male person, then the legacy shall not take effect or be operative."

113 Such revocation is to apply as well to any child or children or wife of the person named hereinafter as a beneficiary, or any person named as a beneficiary in the "Third" Item of the second codicil to my will, which codicil was executed at St. Augustine, Florida, April 28th, 1904, as it does to any child or children or wife of any beneficiary named in said "Eighth" Item of my said last will and testament.

I hereby direct that at the expiration of the trust provided for by my said last will and testament, the trustees shall pay to Henry E. Bemis the sum of Ten Thousand Dollars. This provision for said Henry E. Bemis to be read and construed as a part of the Item numbered "Eighth" of my said last will and testament and subject to the provisions
114 thereof as amended by the above revoking provision of this, "Second" Item of this codicil, the same as if written into said Item numbered "Eighth" as a part of the third subdivision thereof.

Item Third: I wish to, and do hereby amend the "Tenth" Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such

sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes. 115

I also wish to and do hereby amend the "Tenth" Item of my said last will and testament by revoking, and do hereby revoke the power as to the appointment of trustees therein given to the Circuit Judge of the Judicial Circuit in which Palm Beach, Florida, may be and do hereby confer upon the Circuit Judge of the Judicial Circuit in which St. Augustine, Florida, my present place of residence, may be, the same powers intended to be conferred by said Item upon the Circuit Judge of the Judicial Circuit in which Palm Beach, Florida, might be, as provided in said Item of my said last will and testament. 116

In testimony whereof I, the said Henry M. Flagler, have hereunto set my hand and seal at St. Augustine, Florida, this the 8th day of January, 1906.

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(Signed) HENRY M. FLAGLER (Seal).

The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of St. Augustine, St. Johns County, Florida, in our presence, and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we at his request and in his presence and in the presence of each other have hereto set our hands as subscribing wit-

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nesses at St. Augustine, aforesaid, this the day and year last above written.

(Signed) JOHN T. DISMUKES of St. Augustine.
" REGINALD WHITE of St. Augustine.
" W. W. DEWHURST of St. Augustine.

I, Henry M. Flagler, of St. Augustine, St. Johns County, State of Florida, do make publish and declare this instrument as and to be a fourth and additional codicil to my last will and testament executed by me at Palm Beach, Florida,
119 February 1st, 1902.

Item First: It is my desire and will that none of the bequests made in and by the "Eighth" Item of my said will and testament shall, except those in favor of William H. Beardsley, James E. Ingraham and Joseph R. Parrott, be operative in favor of any beneficiary named in such paragraph unless such beneficiary shall at the time of my death be in the employ of myself individually or of the Florida East Coast Railway Company or of the Florida East Coast Hotel Company; and my desire and will is the same as to the several beneficiaries named in the "Third" Item of the
120 second codicil to my said will and testament, executed at St. Augustine, Florida, on the twenty-eighth (28th) day of April, A. D. 1904; and I direct that no payment shall be made to any beneficiary named in said "Eighth" and "Third" Items, excepting however said William H. Beardsley, James E. Ingraham and Joseph R. Parrott, unless he or she shall at the time of my death be in my employ or in that of the Florida East Coast Railway Company, or in that of the Florida East Coast Hotel Company. The terms "Eighth Item" and "Third Item" as used above are to be severally understood as including such Items as changed by me in any codicil to my said will, and as including any person or persons named in any such codicil as a beneficiary; and the fact

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that any such beneficiary may not now be in my employ or in the employ of either of said companies shall not exempt him or her from the above requirement of being at the time of my death in my employ or in that of one of said companies to entitle him or her to the bequest in favor of him or her. 121

Item Second: I hereby exempt all and singular the executors and Trustees named in my last will and testament, or that may be appointed under the provisions thereof, including codicils, from making settlements with returns, including inventories to the County Judge or other Court. Such executors and Trustees shall not, nor shall either or any of them be required to give bond or security as such. 122

In testimony whereof I have hereunto set hereunto set (sic) my hand and seal at St. Augustine, Florida, this seventh day of April, A. D. 1908.

(Signed) HENRY M. FLAGLER (Seal).

The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of St. Augustine, St. Johns County, Florida, in our presence, and by him, in our presence, published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we at his request and in his presence and in the presence of each other have hereto set our hands as subscribing witnesses at St. Augustine, Florida, this the day and year last above written. 123

(Signed) M. W. HARRISON,
967 Greene Ave., Brooklyn, N. Y.
" ANDREW ANDERSON, St. Augustine, Fla.
" GEO. P. RANEY, of Tallahassee, Fla.

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I, Henry M. Flagler, of St. Augustine, Fla., do make, publish and declare this instrument as and to be a fifth and additional codicil to my last will and testament executed by me at Palm Beach, Florida, February 1st, 1902.

Item 1st: My said executors and Trustees are hereby authorized and directed to continue the payment of dividends to Horace H. Flagler, of St. Augustine, Fla., for and during the term of his natural life, on the fifty shares of Standard Oil Company (of New Jersey) stock (Certificate No. 25,085 or any reissues thereof) and on any accumula-
125 tions thereon that may result from stock dividends and upon any stock or other securities that may result from the sale or exchange of said stock in case of any change or reorganization that may take place hereafter.

Item 2nd: The provisions made in my last will and testament in favor of the Memorial Presbyterian Church Society of St. Augustine, Florida, are made upon the assumption and expectation that such Church or Society will maintain and continue its connection with the Presbyterian Church in the United States of America. Should I in my lifetime deliver to the Trustees of such Memorial Presbyterian Church Society cash or securities or other property in lieu
126 or satisfaction of such provisions of my last will and testament, then all such provisions of my last will and testament shall thereupon cease to be of any effect.

In testimony whereof I said Henry M. Flagler, have hereto set my hand and seal at St. Augustine, Florida, this the 22nd day of December, A. D. 1910.

(Signed) HENRY M. FLAGLER (Seal).

The above instrument was signed and sealed by Henry M. Flagler, the testator therein named, of St. Augustine, St. Johns County, Florida, at St. Augustine aforesaid in our

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presence and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated and we at his request and in his presence and in the presence of each other have hereto set our hands as subscribing witnesses at St. Augustine aforesaid this the day and year last above written.

(Signed) GEO. P. RANEY.
" WARREN E. SMITH.
" WADDY O'HEAR THOMPSON.

I, Henry M. Flagler, of the City of St. Augustine, State 128
of Florida, do make this codicil to my last will heretofore made and published by me dated the day of A. D. , which will I hereby ratify and confirm in all respects save as changed by this instrument.

Whereas in and by my said last will I have bequeathed to the Memorial Presbyterian Church Society, a corporation incorporated by chapter 4249, laws of Florida securities of the par value of Seventy-five Thousand Dollars, and since publishing my said last will said Memorial Presbyterian Church Society by deed dated May 29th, A. D. 1911, recorded in the public records of St. Johns County, Florida, in Deed Book 22, pages 61-63, has made a declaration of the trusts 129
under which it holds the lot of land adjoining said Memorial Church on which I have built the mausoleum, one of which trusts is to perpetually care for and maintain said mausoleum, the expense of such maintenance to be met by a fund by me provided. Now, therefore, to provide such fund I do direct that the income from said bequest made in and by my last will to said Memorial Presbyterian Church Society be received, held and expended by said corporation.

First: For the perpetual care and maintenance of the mausoleum built by me, and the church building and manse,

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situated on the lot at the corner of Sevilla and Valencia Streets, in the City of St. Augustine, Florida, which I gave to the trustees of the Presbyterian Church of St. Augustine; then the balance of such income to be used for the general parish expenses of said Memorial Presbyterian Church Society, including its charities.

In testimony whereof I have hereunto set my hand this tenth day of January, A. D. 1912, at St. Augustine, Florida.

(Signed) HENRY M. FLAGLER.

131

The foregoing instrument was signed, published and declared at the date thereof by the said Henry M. Flagler as a codicil to his last will in the presence of us, who at the same time at his request and in his presence, and in the presence of each other, hereunto subscribe our names as attesting witnesses.

(Signed) WARREN E. SMITH.
" WADDY O. THOMPSON

I, Henry M. Flagler, resident of the city of St. Augustine,
132 in the State of Florida, having heretofore made, published and declared my last will and testament, do hereby make, publish and declare the following as and for a codicil thereto.

First: Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making, publishing and declaring of my said last will and testament, certain changes in the form

of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests. 133

Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament, the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the ownership thereof, as I have heretofore or may hereafter exercise and pay for. 134

Second. It is my will that the legacy and bequest to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate.

Third: I hereby revoke the provision in my last will and testament made for the benefit of Horace H. Flagler, of St. Augustine, Florida, and I hereby will and direct that my Trustees and executers (sic) named in my last will and testament pay to the said Horace H. Flagler, during the term of his natural life, the sum of Two Thousand Dollars per annum, same to be paid in quarterly installments, of Five Hundred Dollars each, on the first days of January, April, July and September of each year. 135

Fourth: And I hereby ratify and confirm my said last will and testament in every respect, except in so far as any part of the same is inconsistent with this codicil.

In witness whereof, I have hereunto set my hand and seal, and published and declared this to be a codicil to my

136 *Exhibit A*

said last will and testament in the presence of the witnesses named below, this thirteenth day of September, in the year of our Lord, one thousand nine hundred and twelve.

(Signed) HENRY M. FLAGLER (Seal).

Signed and declared by the said Henry M. Flagler as and for a codicil to his said last will and testament in our presence.

(Signed) R. H. WARREN.

137 " WM. L. WARREN.

" JAMES WEEKS.

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing will, with codicils thereto, in the public records of said county.

138 M. R. COOPER,
County Judge.

Exhibit A 139

PROBATE PROCEEDINGS

PETITION OF JOHN T. DISMUKES

IN THE COUNTY JUDGE'S COURT, SITTING IN PROBATE, STATE OF FLORIDA, ST. JOHNS COUNTY.

In re Estate of

HENRY M. FLAGLER, 140
Deceased.

ST. JOHNS COUNTY.

To the Honorable M. R. Cooper, County Judge in and for the County of St. Johns, State of Florida, Sitting in Probate.

Your petitioner, John T. Dismukes, would respectfully show unto this Honorable Court:

First: That he, the said John T. Dismukes, is a resident of St. Johns County, Florida, and above the age of twenty-one 141 years.

Second: That Henry M. Flagler died on Tuesday, the twentieth day of May, A. D. 1913, and at the time of his death was a citizen of said state and a resident of said county, being above the age of twenty-one years, to-wit: eighty-three years of age, and at the time of his death was seized and possessed of certain real and personal estate, situate and being in said county and state.

Third: That the said Henry M. Flagler died leaving a last will and testament dated the first day of February, A. D. 1902, wherein and whereby the following named persons were

142 *Exhibit A*

named as executors thereof, to-wit: Joseph R. Parrott, William H. Beardsley, and William R. Kenan, Jr., and the said Henry M. Flagler executed said will in the presence of George P. Raney, B. F. Willis, and Leland Sterry, as subscribing and attesting witnesses thereto.

Fourth: And your petitioner further alleges that the said Henry M. Flagler subsequently executed divers codicils to said will and testament, which said codicils were made and executed and attested and witnessed at the times and dates as hereinafter set forth.

143 (a) Codicil dated February 17th, A. D. 1903, executed in the presence of Leland Sterry, George E. Hopkins and A. R. Wood, as subscribing and attesting witnesses thereto.

(b) Codicil dated April 28th, A. D. 1904, executed in the presence of Andrew Anderson, George P. Raney, and B. F. Willis, as subscribing and attesting witnesses thereto.

(c) Codicil dated January 8th, A. D. 1906, executed in the presence of John T. Dismukes, Reginald White, and W. W. Dewhurst, as subscribing and attesting witnesses thereto.

(d) Codicil dated April 7th, A. D. 1908, executed in the presence of Andrew Anderson, George P. Raney, and M. W.
144 Harrison, as subscribing and attesting witnesses thereto.

(e) Codicil dated December 22nd, A. D. 1910, executed in the presence of George P. Raney, Warren E. Smith and Waddy O'Hear Thompson, as subscribing and attesting witnesses thereto.

(f) Codicil dated January 10th, A. D. 1912, executed in the presence of Warren E. Smith and Waddy O. Thompson, as subscribing and attesting witnesses thereto.

(g) Codicil dated September 13th, 1912, executed in the presence of R. H. Warren, William L. Warren and James Weeks, as subscribing and attesting witnesses thereto.

Exhibit A

Fifth: And your petitioner further alleges that he verily believes that the paper writings herewith propounded for probate and record as and for the last will and testament of the said Henry M. Flagler, deceased, and all the codicils heretofore subscribed and set forth with the several dates hereinbefore described and set forth and attested and signed by said witnesses as hereinbefore described and set forth, is the true last will and testament and codicils to said last will and testament of the said Henry M. Flagler, deceased. 145

Sixth: Your petitioner further says that he has no interest whatever under the said last will and testament or under any of the codicils thereto. 146

Therefore your petitioner prays that the said paper writings herewith propounded for probate and record be admitted to probate and record as and for the last will and testament and the codicils thereto of the said Henry M. Flagler deceased, and that Letters Testamentary be granted to the said executors hereinbefore named and set forth in said last will and testament pursuant to law, the said Henry M. Flagler having died in the State of Florida on the day and year first before set forth.

147

And your petitioner will ever pray, etc.

(Signed) JOHN T. DISMUKES,
Petitioner.

148 *Exhibit A*

State of Florida,
County of St. Johns. }

Personally appeared before me John T. Dismukes, to me well known, who, being by me duly sworn, says that the foregoing petition by him subscribed, is true.

Signed and sworn to before me this 24th day of May, 1913.

(Signed) M. R. Cooper,
County Judge.

(Court Seal.)

149 State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. Cooper,
County Judge.

Endorsed: Filed May 24th, 1913.

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

150 In re the Estate of
Henry M. Flagler,
Deceased.

State of Florida,
County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Leland Sterry of New York City, State of New York, who, being by me duly sworn, says that he was personally present as a subscribing and attesting witness with George P. Raney and B. F. Willis who were also present as such subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the

Exhibit A 151

instrument of writing hereto annexed as and for his last will and testament, and that the said Henry M. Flagler did, then and there, in the presence of said Leland Sterry, George P. Raney and B. F. Willis publish and declare the same to be his last will and testament. That the said Leland Sterry, witness, did then and there, at the special request of said Henry M. Flagler and in his presence subscribe his name thereto; that the said Leland Sterry then and there heard the said Henry M. Flagler specially request the said George P. Raney and B. F. Willis to sign the same and that the said George P. Raney and B. F. Willis and this deponent signed
152
their names thereto in the presence of said Henry M. Flagler and in the presence of each other, and at the special request of said Henry M. Flagler, and did subscribe their names as attesting witnesses; and that the said Leland Sterry further swears that he verily believes the said instrument of writing dated February 1st, 1902, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true last will and testament of said testator the said Henry M. Flagler.

(Signed) LELAND STERRY.

Subscribed and sworn to before me this 24th day of May, A. D. 1913.

153

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida, }
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

*Together with No. 735, Flagler v. Comm. and No. 736, Estate of Flagler v. Comm. and No. 737, Matthews v. Comm.

154 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

155 State of Florida, County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Leland Sterry, of New York City, N. Y., who being by me duly sworn says that he was personally present as a subscribing and attesting witness with George E. Hopkins and A. R. Wood, who were also present as the subscribing and attesting witnesses, and saw the testator Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 17th day of February, A. D. 1903, did then
156 and there in the presence of said Leland Sterry, George E. Hopkins and A. R. Wood, publish and declare the same a codicil to his last will and testament; that the said Leland Sterry did then and there at the special request of said Henry M. Flagler and in his presence subscribe his name thereto; that the said Leland Sterry then and there heard the said Henry M. Flagler specially request the said George E. Hopkins and A. R. Wood to sign the same, and that the said George E. Hopkins and A. R. Wood and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that the said Le-

land Sterry further swears that he verily believes the said instrument of writing dated the 17th day of February, A. D. 1903 and hereto attached and so subscribed published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) LELAND STERRY.

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

158

(Signed) M. R. COOPER,
County Judge.

(Court Seal)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

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(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

160 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

161 State of Florida, County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said County, personally appeared John T. Dismukes and W. W. Dewhurst of St. Augustine, Florida, who being by me duly sworn say that they were personally present as subscribing and attesting witnesses with Reginald White of St. Augustine, who was also present as a subscribing and attesting witness and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 8th day of January, A. D. 1906, did
162 then and there in the presence of said John T. Dismukes, W. W. Dewhurst and Reginald White, publish and declare the same a codicil to his last will and testament; that the said John T. Dismukes and W. W. Dewhurst, did then and there at the special request of said Henry M. Flagler, and in his presence subscribe their names thereto; that the said John T. Dismukes and W. W. Dewhurst, then and there heard the said Henry M. Flagler specially request the said Reginald White to sign the same, and that the said Reginald White and these deponents signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flag-

Exhibit A 163

ler, and did subscribe their names thereto as attesting witnesses; and that the said John T. Dismukes and W. W. Dewhurst further swear that they verily believe the said instrument of writing dated the 8th day of January, A. D. 1906, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) JOHN T. DISMUKES.
W. W. DEWHURST.

164

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county. 165

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

166 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
167 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Warren E. Smith and Waddy O'Hear Thompson who being by me duly sworn say that they were personally present as subscribing and attesting witnesses with George P. Raney, who was also present as a subscribing and attesting witness, and saw the testator Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 22nd day of December, A. D. 1910, did then and there in the presence of said Warren E. Smith, Waddy O'Hear Thompson
168 and George P. Raney, publish and declare the same a codicil to his last will and testament; that the said Warren E. Smith and Waddy O'Hear Thompson did then and there at the special request of said Henry M. Flagler, and in his presence subscribe their names thereto; that the said Warren E. Smith and Waddy O'Hear Thompson then and there heard the said Henry M. Flagler specially request the said George P. Raney to sign the same and that the said George P. Raney and these deponents signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses;

and that the said Warren E. Smith and Waddy O'Hear Thompson further swear that they verily believe the said instrument of writing dated the 22nd day of December, A. D. 1910, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) WARREN E. SMITH,
WADDY O'HEAR THOMPSON.

Subscribed and sworn to before me, this 24th day of May, 170
A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida, }
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records 171
of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

172 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
173 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for sai county, personally appeared Warren E. Smith and Wadd O. Thompson, who being by me duly sworn say that the were personally present as subscribing and attesting wi nesses, and saw the testator Henry M. Flagler, subscribe hi name to the instrument of writing hereto attached as an for a codicil to his last will and testament; and that th said Henry M. Flagler, on the 10th day of January, A. D 1912, did then and there in the presence of said Warren E Smith and Waddy O. Thompson, publish and declare th same a codicil to his last will and testament; that the sai
174 Warren E. Smith and Waddy O. Thompson, did then an there at the special request of said Henry M. Flagler and i his presence subscribe their names thereto; that the sai Warren E. Smith and Waddy O. Thompson, then and ther heard the said Henry M. Flagler specially request that sai Warren E. Smith and Waddy O. Thompson, to sign th same and that these deponents signed their names theret in the presence of said Henry M. Flagler and in the pre ence of each other and at the special request of said Henr M. Flagler, and did subscribe their names thereto as attes ing witnesses; and that the said deponents further swea that they verily believe the said instrument of writing date

the 10th day of January, A. D. 1912, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) WARREN E. SMITH.
WADDY O. THOMPSON.

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER, 176
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER, 177
County Judge.

Endorsed: Filed May 24th, 1913.

178 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
179 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared James Weeks, who being by me duly sworn says that he was personally present as a subscribing and attesting witness with R. H. Warren and Wm. L. Warren, who were also present as the subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 13th day of September, A. D. 1912, did then and there in the presence of said James Weeks, R. H. Warren and Wm. L.
180 Warren, publish and declare the same a codicil to his last will and testament; that the said James Weeks, did then and there at the special request of said Henry M. Flagler, and in his presence subscribe his name thereto; that the said James Weeks, then and there heard the said Henry M. Flagler specially request the said R. H. Warren and Wm. L. Warren to sign the same and that the said R. H. Warren and Wm. L. Warren and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that the said James Weeks fur-

Exhibit A 181

ther swears that he verily believes the said instrument of writing dated the 13th day of September, A. D. 1912, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) JAMES WEEKS.

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

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(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

183

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

184 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida, }
County of St. Johns. } ss.:

185 Before me, M. R. Cooper, County Judge, in and for said county, personally appeared William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott, who being duly sworn on oath say that they are the identical persons named and described in the last will and testament of Henry M. Flagler, dated February 1st, A. D. 1902, and appointed in said last will and testament as the executors of said last will and testament; that the said William H. Beardsley resides in the city of New York, state of New York, that the said William R. Kenan, Jr., resides in the city of Lockport, state of New York, and the said Joseph R. Parrott resides in the city of Jacksonville, state of Florida; that they are willing to accept
186 and undertake the trust confided in them and to each of them in said last will and testament and the codicils thereto, and pray that Letters Testamentary issue to them as provided by law.

(Signed) WILLIAM H. BEARDSLEY.
WILLIAM R. KENAN, JR.
JOSEPH R. PARROTT.

Subscribed and sworn to before me this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

Exhibit A 187

State of Florida, }
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. Cooper,
County Judge.

Endorsed: Filed May 24th, 1913.

188

ORDER ADMITTING TO PROBATE AND RECORD IN COURT OF COUNTY JUDGE IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In the Matter of the Last Will and Testament of

Henry M. Flagler, Deceased.

By the County Judge of said county:

The said last will and testament, with codicils thereto, having been duly established by sworn testimony of John T. Dismukes, petitioner, and of Leland Sterry, John T. Dismukes, W. W. Dewhurst, Warren E. Smith, Waddy O'Hear Thompson, Waddy O. Thompson, and James Weeks, subscribing and attesting witnesses thereto, as being the true last will and testament, and codicils thereto, of the said Henry M. Flagler, no objection being made to the probate thereof, and it appearing to the County Judge of said county by due proof that the said Henry M. Flagler died on the twentieth day of May, A. D. 1913: 189

It is therefore ordered, adjudged, and decreed that the said last will and testament, bearing date February 1st,

190 *Exhibit A*

A. D. 1902, attested by Leland Sterry, Geo. P. Raney, and B. F. Willis as subscribing witnesses thereto, and the codicil dated February 17th, A. D. 1903, attested by Leland Sterry, Geo. E. Hopkins, and A. R. Wood as subscribing witnesses thereto, the codicil dated April 28th, A. D. 1904, attested by Andrew Anderson, Geo. P. Raney and B. F. Willis, as subscribing witnesses thereto, the codicil dated January 8th, A. D. 1906, and attested by John T. Dismukes, Reginald White, W. W. Dewhurst as subscribing witnesses thereto, the codicil dated April 7th, A. D. 1908, and attested by Andrew Anderson, Geo. P. Raney, and M. W. Harrison as subscrib-
191 ing witnesses thereto, the codicil dated December 22nd, A. D. 1910, and attested by Geo. P. Raney, Warren E. Smith, Waddy O'Hear Thompson as subscribing witnesses thereto, the codicil dated January 10th, A. D. 1912, and attested by Warren E. Smith, Waddy O. Thompson, as subscribing witnesses thereto, and the codicil dated September 13th, A. D. 1912, attested by R. H. Warren, Wm. L. Warren and James Weeks as subscribing witnesses thereto, be, and the same are, hereby admitted to probate according to law as and for the true last will and testament and codicils thereto of the said Henry M. Flagler, deceased, and that the same, with the proof thereof, be duly recorded in the book of wills.

192 Given under my hand and seal at St. Augustine, in St. Johns County, Florida, this 24th day of May, A. D. 1913.

(Signed) M. R. Cooper,
County Judge.

State of Florida,
County of St. Johns.

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the last will and testament and codicils thereto set forth in the order admitting to probate, together with the proof thereof and said order.

(Signed) M. R. Cooper,
County Judge.

Endorsed: Filed May 24th, 1913.

Exhibit A 193

IN COURT OF THE COUNTY JUDGE, STATE OF FLORIDA, IN PROBATE.

In re the Estate of

HENRY M. FLAGLER,

Deceased.

ST. JOHNS COUNTY.

194

Before me, M. R. Cooper, County Judge of said county, personally appeared William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott, who being by me first duly sworn, say that Henry M. Flagler, late of the county of St. Johns and State of Florida, died on the 20th day of May, A. D. 1913, leaving his last will and testament, and that they the said deponents are named therein as executors thereof. That they will faithfully discharge the duties of executors aforesaid; well and truly perform the said last will and testament; pay the just debts in which the said Henry M. Flagler stood bound, so far as the assets will extend and the law direct; render to and file in the County Judge's Court 195 of said county of St. Johns a just, true and perfect inventory and account of all and singular the estate of said Henry M. Flagler, deceased, and of their administration thereof when thereunto required.

(Signed) William H. Beardsley.
" William R. Kenan, Jr.
" Joseph R. Parrott.

Sworn to and subscribed before me this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal)

196 *Exhibit A*

State of Florida,
County of St. Johns.

Be it remembered, that on this 24th day of May, 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

197

LETTERS TESTAMENTARY

STATE OF FLORIDA, COUNTY JUDGE'S COURT,
ST. JOHNS COUNTY, IN PROBATE.

To All to Whom These Presents Shall Come, Greeting:

Whereas, Henry M. Flagler, late of the county aforesaid, died on the 20th day of May, A. D. 1913, leaving his last will
198 and testament, with codicils thereto, which, having been satisfactorily proven, was, on the 24th day of May, A. D. 1913, duly admitted to probate and record in this Court. And as by said last will and testament appears that William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott were appointed executors having prayed the Court to grant Letters Testamentary thereon to them the said executors as such executors and having, in due form of law, taken the prescribed oath, and performed all other acts necessary to their legal qualification as such executors:

Now therefore, know ye, that I, M. R. Cooper, County Judge in and for the county aforesaid, by virtue of the power

and authority by law in me vested, do hereby declare the said William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott duly qualified by the laws of said State to act as executors of said last will and testament, and codicils thereto, with full power, by the provisions of law and by virtue of these presents, to administer all and singular the goods, chattels, rights and credits of said Henry M. Flagler, and to ask, demand, sue for, recover, and receive the same; to pay the debts in which the said Henry M. Flagler stood bound, so far as the assets shall extend and the law direct; and duly entitled to have and to hold for the purposes directed in and by the said last will and testament and codicils 200 thereto, all the estate of said Henry M. Flagler during the legal continuance of their administration, until the same shall expire by virtue of the provisions of said last will and testament and codicils thereto, or until the power and authority hereby granted shall be duly revoked according to law.

In testimony whereof, I hereunto set my hand and affix the seal of the County Court of the county aforesaid, at St. Augustine, Florida, this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Seal of Court) 201

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing Letters Testamentary in the public records of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

202 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of
HENRY M. FLAGLER,
Deceased.

State of Florida,
203 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Andrew Anderson of St. Augustine, Florida, who being by me duly sworn says that he was personally present as a subscribing and attesting witness with Geo. P. Raney and M. W. Harrison who were also present as the subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing attached to the will as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 7th day of April, A. D. 1908, did then and there in the presence of said Andrew Anderson, Geo. P.
204 Raney and M. W. Harrison, publish and declare the same a codicil to his last will and testament; that the said Andrew Anderson did then and there at the special request of said Henry M. Flagler, and in his presence subscribe his name thereto; that the said Andrew Anderson then and there heard the said Henry M. Flagler specially request the said Geo. P. Raney and M. W. Harrison to sign the same and that the said Geo. P. Raney and M. W. Harrison and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that

the said Andrew Anderson further swears that he verily believes the said instrument of writing dated the 7th day of April, A. D. 1908, and attached to said will and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) ANDREW ANDERSON.

Subscribed and sworn to before me this 29th day of May, A. D. 1913.

206

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 29th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

207

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 29th, 1913.

208 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
209 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Andrew Anderson of St. Augustine, Florida, who being by me duly sworn says that he was personally present as a subscribing and attesting witness with Geo. P. Raney and B. F. Willis, who were also present as the subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing attached to the will as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 28th day of April, A. D. 1904, did then and there in the presence of said Andrew Anderson, Geo. P.
210 Raney and B. F. Willis, publish and declare the same a codicil to his last will and testament; that the said Andrew Anderson did then and there at the special request of said Henry M. Flagler, and in his presence subscribe his name thereto; that the said Andrew Anderson then and there heard the said Henry M. Flagler specially request the said Geo. P. Raney and B. F. Willis to sign the same and that the said Geo. P. Raney and B. F. Willis and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that the said Andrew

Exhibit A

Anderson further swears that he verily believes the said instrument of writing dated the 28th day of April, A. D. 1904, and attached to the will and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) ANDREW ANDERSON.

Subscribed and sworn to before me this 29th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.

Be it remembered that on this 29th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 29th, 1913.

214 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

I, M. R. Cooper, County Judge, in and for said county, do hereby certify, that I am sole presiding Judge of the Court of the County Judge in and for St. Johns county, state of Florida; that said Court, under the Constitution and Laws of the state of Florida, has and exercises Probate Jurisdiction in said St. Johns county; that as such presiding Judge, I am ex-officio clerk of said Court, there being no qualified
215 clerk thereof; that as such sole presiding Judge and ex-officio clerk, I have, by law, the custody of the Seal, and all books, records, documents, papers and files appertaining to said Court; that the foregoing, from page one to page 35 hereof, inclusive, are full, true and correct copies of the last will and testament, with codicils thereto, of Henry M. Flagler, deceased, together with all probate proceedings thereon, to the date of this certificate, including Letters Testamentary issued upon the estate of Henry M. Flagler, deceased; and that all the originals of same are on file and of record in my said office, and recorded in book B of Wills on pages 202 to 241, inclusive; and that Wm. M. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott the executors in said will are duly
216 qualified and still acting as such executors.

In testimony thereof, I have hereunto set my hand and affixed the seal of said Court, at St. Augustine, Florida, this 6th day of June, A. D. 1913.

(Signed) M. R. Cooper,
County Judge.

Exhibit A

State of Florida,
St. Johns County.

I, M. R. Cooper, County Judge of the county of St. Johns and State of Florida, and ex-officio Judge of the Probate Court of said county, do hereby certify that M. R. Cooper, whose signature appears to the foregoing exemplification and attestation made by him, is in due form of law and by the proper officer, and that at the date hereof he is County Judge of St. Johns county, Florida, and the seal thereto attached is the seal of said County Judge's Court.

In witness whereof I have hereunto affixed my name and the seal of my office at St. Augustine, in said county, this 6th day of June, A. D. 1913.

(Court Seal).

(Signed) M. R. Cooper,
County Judge and Ex-Officio
Judge of the Probate Court of
St. Johns County, Florida.

STATE OF FLORIDA

OFFICE OF THE SECRETARY OF STATE

I, H. Clay Crawford, Secretary of State, of the State of Florida, do hereby certify that M. R. Cooper was on the 24th day of May, A. D. 1913, and still is County Judge of the County of St. Johns, State of Florida, and as such County Judge is fully authorized and empowered under the constitution and laws of the State of Florida, to admit to probate and to record all wills of decedents and codicils thereto, to take proof of the same, to issue letters testamentary, and to do and perform all matters and things pertaining to probate

220 *Exhibit A*

jurisdiction, and is fully authorized and empowered to certify under his signature and the seal of his Court, to the probating and recording of wills and codicils thereto, and to all matters and things done and performed by him in his official capacity in all matters pertaining to probate jurisdiction.

I further certify that his Court has no official clerk and that he is ex-officio clerk of his own court.

I further certify that the seal of the Court of the County Judge of St. Johns County, Florida, sitting in probate, af-
221 fixed to the foregoing, on page numbered 36 thereof, is the genuine seal of said Court, *and I verily believe that each of the signatures attested to the foregoing copy is genuine,* and I verily believe that the signature of M. R. Cooper, Judge of said Court, sitting in probate, to the aforesaid certificates concerning the probate and proofs of the will, and codicils thereto, of Henry M. Flagler, deceased, are genuine.

In Witness Whereof, I, H. Clay Crawford, Secretary of State of the State of Florida, having the legal custody of the Great Seal of the State of Florida, have hereunto set my hand and the Great Seal of the State of Florida, at Talla-
222 hassee, Florida, this 7th day of June, A. D. 1913.

(Signed) H. CLAY CRAWFORD
Secretary of State of the
State of Florida.

(State Seal of Florida)

Memorandum Opinion

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

224

JOSEPH C. WHITE, ESQ., for the petitioner.
JOHN R. WHEELER, ESQ., for the respondent.

MURDOCK: The Commissioner determined a deficiency of $11,150.47 in the petitioner's income tax for the calendar year 1936. The facts have been stipulated and the Board adopts the stipulation as its findings of fact. The petitioner sold 1,919 shares of preferred stock of Standard Oil Export Corporation in 1936. The only issue for decision is whether her basis for gain or loss on those shares is the fair market value of the predecessor stock on the date of death of Henry M. Flagler, from whom she acquired the stock by will, or the fair market value of the predecessor stock when shares 225 were distributed to her by the trustees under the will. The Commissioner has determined that the fair market value of the predecessor stock on the date of the death of the testator is the proper date. The Board has heretofore decided the point in accordance with the Commissioner's present contention on two occasions. *Elizabeth G. Augustus,* 40 B. T. A. 1200; *Richard J. Reynolds,* 41 B. T. A. 59. Although the author of the present opinion was of a different view from the majority of the Board in those cases, nevertheless the Board here follows its prior opinions.

Decision will be entered for the respondent.

Enter:

ENTERED MAY 31, 1940.

(Seal)

226

Decision

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

227

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered May 31, 1940, it is

ORDERED AND DECIDED: That there is a deficiency in income tax of $11,150.47 for the year 1936.

(Signed) J. E. MURDOCK,
Member.

228

Enter:

ENTERED MAY 31, 1940.

Petition for Review of Decision of the United States Board of Tax Appeals

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A. Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Mary Flagler Cary, the Petitioner herein, a citizen of the United States with residence at 1009 Park Avenue, New York, New York, and in support of this her petition filed in pursuance of Section 1142 of the Internal Revenue Code for the review of the order and decision, hereinafter described, of the United States Board of Tax Appeals rendered on May 31, 1940, respectfully shows to this Honorable Court as follows:

I. STATEMENT OF THE NATURE OF THE CONTROVERSY.

1. On August 25, 1938, the Commissioner of Internal Revenue, the Respondent herein, mailed to the Petitioner by registered mail a notice of the determination of an asserted deficiency in income tax for the calendar year 1936 in the amount of $11,150.47. On November 5, 1938, the Petitioner

232 *Petition for Review of Decision of the United States Board of Tax Appeals*

duly filed with the United States Board of Tax Appeals (hereinafter called the Board) a petition for the re-determination of $11,084.00 of said asserted deficiency. The remainder of said asserted deficiency, being $66.47, is not in dispute.

2. Said $11,084.00 of income tax claimed by the Respondent to be due from the Petitioner resulted from the use by the Respondent, in computing basis and gain on the sale by the Petitioner in 1936 of certain stock, of the fair market value
233 as of May 20, 1913, of certain predecessor stock.

3. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, with seven codicils thereto. By said will, a trust was created to continue for a term of five years from the time of the death of the Testator and for an additional term not exceeding five years if the Testator's Florida properties should be in such a condition as "to require financial aid from someone outside of themselves * * *." Pursuant to this provision, this trust did continue for the full additional term and terminated on May 20, 1923.

234 4. By the terms of said Last Will and Testament and of the Codicils thereto the Petitioner became entitled to receive and did receive from the Trustees under said Will and Codicils subsequent to May 20, 1923, but as of that date, 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited.

5. Said 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner from said Trustees, had been acquired by said Trustees as follows:

a. Two thousand six hundred sixty-six and two-thirds of said shares were received, with others, by

said Trustees from the Estate of the Testator as of the date of his death, namely, May 20, 1913.

b. On November 26, 1913, after said Estate was in the hands of said Trustees, a 100% stock dividend was declared by Anglo-American Oil Company, Limited. Said Trustees accordingly received as a stock dividend on December 3, 1913, 2,666⅔ additional ordinary shares of said stock.

c. In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional ordinary shares of said stock. In the exercise of said rights 2,666⅔ shares were subscribed for by said Trustees at a cost of $7.50 per share. Those 2,666⅔ shares were received by said Trustees on May 1, 1918.

6. After a stock dividend in 1925 which increased Petitioner's holdings of the ordinary shares of the stock of Anglo-American Oil Company, Limited, from 8,000 to 10,666 shares, the Petitioner in a tax-free reorganization in 1930 exchanged said 10,666 ordinary shares for 1,919.88 shares of the preferred stock of Standard Oil Export Corporation.

7. In May, 1936, the Petitioner sold 1,919 shares of the preferred stock of Standard Oil Export Corporation.

8. The Petitioner contended in her appeal before the Board that the basis for the computation of gain or loss under Section 113(a)(5) of the Revenue Act of 1936 on the sale of the Standard Oil Export Corporation preferred stock sold by her in 1936 was the fair market value of the predecessor stock on May 20, 1923, the date when the Petitioner first obtained possession, control, enjoyment, and substantial ownership of said predecessor stock.

9. The Respondent contended that the basis for the computation of gain or loss on said sale of said Standard Oil

238 *Petition for Review of Decision of the United States Board of Tax Appeals*

Export Corporation preferred stock was the fair market value of the predecessor stock on May 20, 1913, the date of death of the Testator.

10. On May 31, 1940, the Board promulgated its memorandum findings of fact and opinion wherein it decided in accordance with the contention of the Respondent that the basis for the computation of gain or loss was the fair market value on the date of death of the Testator.

239 11. On May 31, 1940, the Board rendered, and entered in its records, an order and decision in accordance with its said opinion whereby it ordered and decided that there is a deficiency in income tax of the Petitioner for the year 1936 in the amount of $11,150.47.

II. DECLARATION OF THE COURT IN WHICH THE REVIEW IS SOUGHT.

The Petitioner, feeling aggrieved by said order and decision, hereby petitions for the review thereof by the United States Circuit Court of Appeals for the Second Circuit, in
240 which Circuit is located the office of the Collector of Internal Revenue to which was made the return in respect of which the liability involved in the appeal arises.

III. ASSIGNMENTS OF ERRORS.

The Petitioner as a basis for the review of said order and decision makes the following assignments of errors:

1. The Board erred in that it decided and held that in determining the basis of the Petitioner for the computation of gain or loss on the sale in 1936 of the preferred stock of Standard Oil Export Corporation there should be used the

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fair market value of the predecessor stock on the date of death of said Henry M. Flagler under the will of whom she acquired the predecessor stock.

2. The Board erred in that it did not decide and hold that the basis of the Petitioner for the computation of gain or loss on the sale in 1936 of the preferred stock of Standard Oil Export Corporation was the fair market value of the predecessor stock on the date when the Petitioner became entitled to receive said predecessor stock from the testamentary trustees under the will of said Henry M. Flagler.

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3. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the basis for the computation of gain or loss upon the sale in 1936 by the Petitioner of 1,919 shares of preferred stock of Standard Oil Export Corporation is the fair market value on May 20, 1923, of its predecessor stock, on which date the testamentary trust created under the will of said Henry M. Flagler terminated, and as of which date the Petitioner received said predecessor stock.

4. The Board erred in that it decided and held that in determining the basis of said 1,919 shares of preferred stock of Standard Oil Export Corporation sold in 1936 there should be used the fair market value of the predecessor stock on May 20, 1913, the date of death of said Henry M. Flagler.

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5. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the "time of * * * acquisition" of the property involved in this proceeding and acquired by the Petitioner by bequest is the date upon which she obtained possession, enjoyment, control, and substantial ownership of such property.

244 *Petition for Review of Decision of the United States Board of Tax Appeals*

6. The Board erred in that it decided and held that under Section 113(a)(5) of the Revenue Act of 1936 the "time of * * * acquisition" of the property involved in this proceeding was May 20, 1913.

7. The Board erred in that it decided that "time of such acquisition," as used in Section 113(a)(5) of the Revenue Act of 1936, means the date of death of the decedent as to all property acquired from the decedent "by bequest, devise, or inheritance," regardless of whether title to the property
245 thus acquired as of the date of death of decedent was contingent or vested.

8. The Board erred in that it did not decide and hold that the Petitioner first acquired possession, enjoyment, control, and substantial ownership of the property involved in this proceeding on May 20, 1923, the effective date of the transfer to the Petitioner by the testamentary trustees.

9. The Board erred in that it did not decide and hold that the bequest to the Petitioner was contingent and did not vest in her until she was entitled to receive the predecessor stock on the termination of the trust created by the will
246 of said Henry M. Flagler.

10. The Board erred in that it did not decide and hold that there was no deficiency due by the Petitioner in respect to her income tax for the calendar year 1936 other than the deficiency of $66.47 which is not in controversy.

11. The Board erred in that it decided and held that there was a deficiency in income tax of the Petitioner for the calendar year 1936 in the amount of $11,150.47.

12. The Board erred in deciding and holding contrary to the law.

Petition for Review of Decision of the United States Board of Tax Appeals 247

13. The Board erred in deciding and holding contrary to the evidence.

WHEREFORE, your Petitioner prays that said order and decision of the Board be reviewed and reversed by the United States Circuit Court of Appeals for the Second Circuit in accordance with law and for such other and further relief as said Court may deem meet and proper in the premises.

MARY FLAGLER CARY,
Petitioner,
By JOSEPH C. WHITE,
Joseph C. White
Attorney of Record for
Petitioner. 248

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JOSEPH C. WHITE, being first duly sworn, deposes and says that he is the attorney of record for Mary Flagler Cary, the petitioner herein, and as such is duly authorized to verify the above petition for review; that he has read said petition; that the facts therein set forth are true to the best of his knowledge, information and belief; and that said petition is filed in good faith. 249

JOSEPH C. WHITE

Subscribed and sworn to before
me this 23rd day of August, 1940.

JOHN C. BARNWELL
John C. Barnwell
Notary Public, Bronx County
Bronx Co. Clk's No. 266, Reg No. 279B41
Certificates Filed in
N. Y. Co. Clk's No. 1467 Reg. No. 1B370
Kings Co. Clk's No. 137 Reg. No. 1536
Commission Expires March 30, 1941
[NOTARIAL SEAL]

250 **Notice of Filing Petition for Review**

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A.

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

251 COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To:

GUY T. HELVERING, ESQ.,
Commissioner of Internal Revenue,
Washington, D. C.

SIR:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, Mary Flagler Cary, the petitioner in the above-entitled proceeding, filed with the Clerk of the United States Board of
252 Tax Appeals the petition of said petitioner, a copy of which is annexed hereto, for review by the United States Circuit Court of Appeals for the Second Circuit of the order and decision of said Board rendered and entered in its records in the above-entitled proceeding on May 31, 1940.

New York, N. Y., August 27, 1940.

JOSEPH C. WHITE,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

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ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of petition for review and service of a copy of the petition therein mentioned is acknowledged this 27th day of August, 1940.

JOHN P. WENCHEL,
John P. Wenchel
Chief Counsel for the Bureau
of Internal Revenue,
Attorney for the Respondent.

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Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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To the Clerk of the United States Board of Tax Appeals:

As required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit, please prepare and within sixty days from August , 1940, the date on which the petition for the review by said Court of the decision and order rendered by the United States Board of Tax Appeals (hereinafter referred to as the Board) in the above-entitled proceeding was filed with you and on which a copy of said petition with notice that it had been so filed was served upon the respondent in said proceeding, transmit

256 *Praecipe for Record*

and deliver to the Clerk of said Court copies duly certified as correct of the following documents:

1. The docket entries of the proceedings before the Board in the above-entitled proceeding;

2. The petition, together with exhibit thereto, in said proceeding for redetermination of the deficiency of income tax;

3. The answer of the respondent in said proceeding;

257 4. The stipulation of facts and exhibit thereto introduced at the hearing;

5. The memorandum findings of fact and opinion entered May 31, 1940;

6. The order and decision of the Board entered in its records May 31, 1940;

7. The petition for the review of said decision by the United States Circuit Court of Appeals for the Second Circuit;

8. The notice of the filing of said petition with the Clerk of the Board and the admission of the service thereof
258 on the respondent in said proceeding;

9. This praecipe for record;

10. The notice of the filing of this praecipe for record with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding.

New York, N. Y.,
August , 1940.

JOSEPH C. WHITE,
Joseph C. White
Attorney for Petitioner.

Notice of Filing of Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To:

JOHN P. WENCHEL, Esq.,
Chief Counsel for the Bureau of Internal Revenue,
Attorney for the Respondent,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, the undersigned attorney for the petitioner in the above-entitled proceeding has filed with the Clerk of the United States Board of Tax Appeals the praecipe for record, of which a copy is annexed hereto.

JOSEPH C. WHITE,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

New York, N. Y.,
August 27, 1940.

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ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of the Praecipe for Record and service of a copy of the praecipe herein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL,
John P. Wenchel,
Chief Counsel for the
Bureau of Internal Revenue,
Attorney for the Respondent.

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Clerk's Certificate

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, 266

Respondent.

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 104, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of Sept., 1940. 267

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

(Seal)

268 **Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B.T.A. Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

269 *against*

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

B.T.A. Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

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B.T.A. Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts 271

B.T.A. Docket No. 96237

JEAN LOUISE MATTHEWS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AND ORDER 272

IT IS HEREBY STIPULATED AND AGREED by and between the above-named petitioners, by their attorney of record, Joseph C. White, and the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General of the United States, as follows:

The above four cases involve an identical question of law and were consolidated for purposes of the Brief and Argument before the United States Board of Tax Appeals.

Separate stipulations of facts and separate records were made in the United States Board of Tax Appeals in each of the above four cases. A part of the stipulation of facts in 273 each of the above four cases was an exhibit consisting of a certified copy of the Last Will and Testament, with codicils thereto, of Henry M. Flagler. This exhibit is sixty-five mimeographed pages long and the parties hereto agree, in order to avoid unnecessary printing expense, that this exhibit, a part of the stipulation of facts in each of the above four cases before the United States Board of Tax Appeals, may be printed only once, to wit, in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue,* which case has the lowest Docket Number in the United States Board of Tax Appeals, when the cases come on for

274 *Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts*

appeal before the United States Circuit Court of Appeals for the Second Circuit. In lieu of the printing of the above-mentioned exhibit in the other three records a copy of this Stipulation and Order will be printed in those records and cross references made to the exhibit printed in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue.*

IT IS FURTHER AGREED by and between the parties hereto that the above four cases may be consolidated for purposes
275 of the Brief in the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH C. WHITE
Joseph C. White,
Attorney for Petitioners.

SAMUEL O. CLARK, JR.
Samuel O. Clark, Jr.,
Assistant Attorney General of the United States

So ordered:

276 Dated October 24, 1940.

THOMAS W. SWAN
U. S. C. J.

[fol. 93] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

(Argued January 8, 1941. Decided January 17, 1941)

Nos. 145-6-7-8

MARY FLAGLER CARY, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Executor of Annie L. Flagler, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

[fol. 94] JEAN LOUISE MATTHEWS, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

On appeal from four orders of the Board of Tax Appeals fixing deficiencies in income taxes for the years 1934 and 1936

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Roswell L. Gilpatric for the Petitioners.
Helen R. Carloss for the Respondent.

PER CURIAM:

Orders affirmed on the authority of Van Vranken v. Helvering, 115 Fed. (2) 709 (C. C. A. 2).

[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

MARY FLAGLER CARY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 96] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Mary Flagler Cary, v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 22, 1941. D. E. Roberts, Clerk.

[fol. 97] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 98] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 684.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.